IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 162

J. L. GREENE AND HAZEL McCORMICK GREENE, *Petitioners*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit

AND SUPPORTING BRIEF

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered on March 15, 1944.

Opinions Below

The Memorandum Opinion of The Tax Court of the United States (R. 39-45) is unreported. The Opinion of the Circuit Court of Appeals (R. 101-107) is reported at — Fed. (2) —.

Jurisdiction

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit was entered March 15, 1944. The jurisdiction of this Court is invoked under Section 240(a) of the JUDICIAL CODE, as amended by the Act of February 13, 1925.

Question Presented

Were certain undeveloped oil and gas leases, royalty interests, and fee lands, which petitioners sold in 1938 and 1939, held by them primarily for sale to customers in the ordinary course of a trade or business, and excluded from the term "capital assets" as defined by Sec. 117 of the REVENUE ACT OF 1938? (p. 13).

Statement

Petitioners are husband and wife and they reside in Midland, Texas. Petitioner J. L. Greene is a licensed broker and maintains an office at Midland, Texas (R. 53). From time to time he has purchased unproven oil properties for his own account. During 1938 and 1939, Greene sold certain of the oil and gas leases, royalty interests, and two parcels of fee lands which he had previously purchased. The question before The Tax Court was whether the gains on such sales were short-term capital gains taxable to the extent of one hundred per cent, as determined by the respondent, or whether the gains were long-term capital gains, less than one hundred per cent of which are to be taken into account in computing net income. All of the properties had been held for the required length of time for the gain to qualify as long-term capital gains, but the respondent determined that the properties were held by Greene primarily for sale to customers in the ordinary course of his trade or business and were there-

fore excluded or excepted from the term "capital assets," as defined by Sec. 117(a)(1) of the REVENUE ACT OF 1938 (p. 13, R. pp. 54-55).

The properties were acquired under these circumstances. Since 1931, Greene has been chiefly occupied in purchasing oil and gas leases for major oil companies. The oil companies generally gave Greene orders to buy leases for them in a given area. Greene would purchase the leases in his own name and when titles were approved the leases would be transferred to the oil companies for whom they were purchased. The funds used by Greene to purchase the leases were supplied by the oil companies and he received a commission for his services in acquiring the leases. Greene had no actual interest in the leases so acquired, it being a common practice in the industry for large oil companies to have an individual buy leases for them and take title in his own name (R. 54). Buying leases for others was Greene's main means of livelihood.

As is usual among men thrown in contact with the oil business, Greene purchased some leases and royalty interests for his own account. Among these were the leases and interests which he sold in 1938 and 1939, and which gave rise to this controversy. Greene did not acquire the leases and royalty interests with the purpose or motive of offering them for resale and he had no person or persons in mind to whom he might sell or offer to sell a given property at the time he bought it. He did not know what he would do with the properties when he bought them. Disposition depended upon the approach or proximity to the properties of drilling or other exploratory operations and the results indicated thereby. Greene testified that, depending on circumstances, like any owner of leases exercising attributes of ownership, he might drill and operate a lease himself (he did drill eleven wells on properties in which he held an interest), or he might "farm out" a lease for another to drill, or he might sell a lease or

property if the facts, in his judgment, indicated it should be sold, or that he might abandon or forfeit a lease by failing to pay the rent thereon when it fell due (R. 54-55). The record shows that Greene abandoned six leases and one royalty interest in 1938 which had cost him $959.12 (R. 73-74), and an undisclosed number of leases in 1939 which had cost him $7,409.20 (R. 87).

As an example of his operations, Greene in his testimony cited a royalty interest in Gaines County, Texas, which he acquired in March, 1934, and sold in October, 1938. He testified that he did not have a customer in mind that he was going to sell the royalty to when he acquired it; that he did not know a "single human being to whom he would even offer it for sale;" and that he had no such purpose or motive in mind when he acquired the interest. He further testified that he sold the property when he thought it advantageous because there was a well closely offsetting it which was low on the structure, and which he thought would be so small that "it would not be worth very much" (R. 54-55). Greene further illustrated his operations by assuming that he had purchased a "wildcat" lease or two in Gaines County, Texas, which had some wells close by. If the wells did not look good to him and he could get a buyer for the leases, Greene testified he would sell them; and if he could not get a buyer, he likely would forfeit the leases by not paying the rentals. He testified that these circumstances applied to all of the properties which he purchased and that in determining what to do with a given lease or other property he would be governed by the turn of events occurring after he acquired it (R. 55-56).

The above statement is taken from the evidence given at the hearing before The Tax Court. Greene was the only witness before The Tax Court. His testimony was not contradicted or disputed and no countervailing or rebutting

evidence was offered or received on behalf of the respondent. The Tax Court upheld the respondent's contention that the properties sold by Greene in 1938 and 1939 were held by him for sale to customers in the ordinary course of a trade or business and they were therefore excluded from the term "capital assets," as defined by Sec. 117(a)(1) of the REVENUE ACT OF 1938 (R. 39-45). The Circuit Court of Appeals, with one Judge dissenting, affirmed the decision of The Tax Court (R. 101-107).

Specification of Errors to Be Urged

1. The provision in the Revenue Laws for taxing capital gains at lower rates than ordinary income is taxed were "adopted to relieve the taxpayers from these excessive tax burdens on gains resulting from a conversion of capital investments and remove the deterrent effect of those burdens on such conversion." BURNET v. HARMEL, 287 U.S. 103, and HOUSE REPORT NO. 350 WAYS AND MEANS COMMITTEE, 67th Congress, First Session, on the Revenue Bill of 1921 (p. 14). Statutes providing for relief to taxpayers should be liberally construed so as to accomplish the result which Congress intended. BONWIT TELLER & CO. v. U. S., 283 U.S. 258; KEEBLE, JR., v. COMMISSIONER, 2 T.C. —No. 148; SLOUGH, ET AL., v. COMMISSIONER, 3 T.C.—No. 73. In upholding the decision of The Tax Court that the properties in question were held primarily for sale to customers in the ordinary course of a trade or business, the courts below resolved all doubts against the petitioners and gave no consideration to the fact that Sec. 117 is a relief measure. Their decisions are in conflict with the rule announced by this Court in BONWIT-TELLER & CO. v. U. S. supra, for the construction of relief measures.

2. The Circuit Court of Appeals erred in finding that the

taxpayers admitted being in the business of buying and selling oil properties and in drawing from such alleged admission the inference that the properties in controversy "must have been held primarily for sale to customers in the ordinary course of business." The only admission made by petitioners was that they were engaged in a trade or business (R. 43). Such admission was made in their Tax Court brief. *Nowhere did the taxpayers admit that they were engaged in buying and selling oil properties as a business.* Consequently the court decided the case against the taxpayers on an erroneous premise.

3. The Circuit Court of Appeals erred in upholding the decision of The Tax Court for the reason that there was no evidence to support the finding of that court that the properties were held primarily for sale to customers in the ordinary course of his trade or business. The uncontradicted and undisputed evidence completely negatived the respondent's determination that the properties in controversy were held for sale to customers in the course of a trade or business.

4. The Circuit Court of Appeals should not have limited its consideration of the case to the question of whether there was any substantial evidence to support the findings of The Tax Court. A question of law was involved which should have been passed on by the Circuit Court.

5. The evidence showed that the properties were purchased for investment purposes; that disposition or use was governed by facts and circumstances occurring after they were acquired; and that they could not have been held for sale to customers in the course of a trade or business.

Reasons Relied Upon For Granting The Writ

FIRST. The question presented is of such great general

interest that it transcends the individual case. A large segment of the taxpaying public is affected. People in most every walk of life, such as lawyers, doctors, bankers, brokers, insurance men, and the like, who have been thrown in contact with the oil industry, have invested some of their savings and capital in leases, royalty and mineral interests, proven and unproven, and real estate in general, with the hope and expectation that values will increase and profits will be realized through conversions. When do these purchases become stock in trade? When two or a dozen leases or farms are purchased? Or when purchases and sales are numerous and frequent and the volume large? Or is the purpose and intent in purchasing a property the controlling factor? The respondent has often taken the position that a property represents stock in trade if a gain is involved and a capital asset when a loss is claimed on the sale. Property owners do not know where they stand. They hesitate to make sales which they could advantageously make because they do not know whether the properties will be regarded as capital assets or stock in trade by the taxing authorities and the courts. The amount of tax payable as a result of a sale of property is the dominant factor to consider in determining whether to sell or not to sell. This court has never passed on the provision of Sec. 117 which excludes from the operation of the statute gains from the sale of property held primarily for sale to customers in the ordinary course of a trade or business. An authoritative decision by this Court as to the meaning, scope, and application of the provision would do much to clear up the confusion and uncertainty which now exists in the minds of property owners and to remove the deterrent effect which the lower court decisions and the inconsistent positions taken by respondent has had on property sales.

SECOND. In the particular case, The Tax Court and the Circuit Court of Appeals erred in not construing the relief

statute (Sec. 117) liberally in favor of the petitioners and their decisions are in conflict with the principles announced by this Court in BONWIT TELLER & CO. v. U. S., supra.

THIRD. The Circuit Court of Appeals misread the record in these cases. It assumed that the record showed that the taxpayers admitted they were engaged in the business of buying and selling oil properties. There is no such admission in the record. The decision of the Circuit Court of Appeals was predicated largely on the erroneous assumption that the taxpayers made the said admission and an injustice and hardship will be worked upon the petitioners unless the error made by the Circuit Court of Appeals is corrected by this Court.

FOURTH. There was no evidence before The Tax Court to support its finding that the properties were held primarily for sale to customers in the ordinary course of trade or business. On the contrary, the evidence was implicit that the properties were not held for the interdicted purpose. Therefore, the Circuit Court of Appeals should have reversed the decision of The Tax Court instead of affirming it.

FIFTH. There is an apparent conflict between the decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case and the decision of the Circuit Court of Appeals for the Second Circuit in TAYLOR v. COMMISSIONER, 76 Fed. (2d) 904.

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